NOOR ASIAH MAHMOOD & ANOR

v.

RANDHIR SINGH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-23-17-1998]
29 DECEMBER 1999

TORT: *Defamation - Fair comment - Failure to ascertain facts before publication - Whether s. 9 Defamation Act 1957 applicable - Facts not proved - Whether a fundamental flaw*

TORT: *Defamation - Libel - Whether specific words or sentences that are defamatory must be identified - Whether sufficient if article read as a whole is defamatory*

TORT: *Defamation - Libel - Whether actionable per se - Intention of defamer - Whether irrelevant - Fair comment - Whether statements constituted fair comment*

The plaintiffs filed a libel suit against the 1st and 2nd defendants as authors of two articles ('the articles') published in a leading local newspaper, the New Straits Times. The plaintiff's claim against the 3rd, 4th and 5th defendants was based on the fact that they were the Sports Editor, Group Editor and publisher respectively of the said newspaper. The plaintiffs claimed that the articles inferred that the plaintiffs would reap large profits from their company, one Seamos, through its involvement in the Sukom Accomodation Bureau. The said bureau provided accommodation during the Commonwealth Games held in Kuala Lumpur.

The plaintiffs claimed that at the time the articles were published, *ie*, on 8 and 10 February 1998 respectively, the plaintiffs had already resigned from Seamos.

The defendants claimed the defence of fair comment.

Held:

[1] Both the plaintiffs were no longer the shareholders and/or directors of or in any way involved with Seamos at the time the articles were published. The defendants, as admitted by them, could have easily ascertained whether the plaintiffs were at the material time of the publication directors and/or shareholders of Seamos by making a search

at the Registrar of Companies. However, they failed to do so. In a defence of fair comment, the onus was on the defendants to prove any allegations of facts to be true which the defendants failed to do.

[2] The articles when read as a whole would lead those who were dealing with the plaintiffs to the conclusion that they: (i) referred to the plaintiffs; (ii) were defamatory of the plaintiffs; and (iii) were written with the intention of identifying the plaintiffs.

[3] It was not necessary for the plaintiffs to identify the specific words or sentences that were defamatory of them. Not only could words and sentences be defamatory, the articles read as a whole was defamatory of the plaintiffs because of the chain of events entwined throughout the articles that formed a tapestry to portray the plaintiffs as the ones defamed.

[4] Where the facts and comments are so intermingled as in this case, the reasonable reader will assume that the injurious statements are clearly based on adequate factual grounds known to the writers. Any statement which does not indicate with reasonable clarity that it is a mere comment and not a statement of fact cannot be protected by the defence of fair comment.

[5] Section 9 of the defamation Act 1957 did not come to the aid of the defendants. There was a fatal fundamental flaw in the defendant's assertion as a fact that the two plaintiffs were owners of Seamos at the material time of the publication when such was not a fact at all.

[5a] Although the articles revolved upon matters of public interest, freedom of speech coupled with a licence to write must be subject to the law of libel and slander. Without these constraints persons and parties unjustifiably maligned will have no recourse.

[6] Where a defendant is indifferent to the truth or otherwise of the words complained of, express or actual malice may be inferred. The 1st defendant was reckless in failing to carry out any proper inquiries of the plaintiffs' status in Seamos before concluding that they owned Seamos. The 2nd defendant was at fault when he frankly admitted to relying on the experience of the 1st defendant to check out and ascertain the facts.

[7] Whilst the defendants' intention could have been honourable, libel does not depend on the intention of the defamer and it is irrelevant to consider the meaning the writers and publisher intend to convey. The question is to be determined by a reasonable reader.

[8] The articles imputed to the plaintiffs' dishonourable and unscrupulous conduct and lack of integrity. Such an imputation upon the character of the plaintiffs warranted reasonable damages. Libel is actionable *per se* without proof of actual harm.

[8a] The plaintiffs held themselves high in the business world and considering the fact that the New Straits Times had a wide circulation in the country, the plaintiffs by the said publication had been brought to ridicule and contempt. As such, the 1st plaintiff should be awarded RM300,000 and the 2nd plaintiff the sum of RM200,000.

[8b] No offer of apology was tendered and considering the reckless manner in which the articles were written, the award for aggravated damages must reflect the uncaring attitude of the defendants. A sum of RM200,000 should be awarded to each plaintiff as aggravated damages.

[Judgment for the plaintiffs.]

Case(s) referred to:
Charleston & Anor v. News Group Newspapers Ltd [1995] 2 WLR 450 ***(refd)***
Hunt v. Star Newspaper Co Ltd [1908] 2 KB 319 ***(refd)***
Joshua Benjamin Jeyaratnam v. Goh Chok Tong [1989] 3 MLJ 1 ***(refd)***
Ratus Mesra Sdn Bhd v. Shaik Osman Majid [1999] 3 MLJ 529 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 9

Other source(s) referred to:
Randhir Singh, *Point by Randhir Singh*, The New Straits Times

For the plaintiffs - GK Ganesan (S Chrishanthini with him); M/s GK Ganesan Saiful & Rokiah
For the defendants - Ahmad Redza Abdullah (T Shanti and Mohd Nadzim Ibrahim with him); M/s Shahrizat & Tan

Reported by Kavitha Gunasegaran

JUDGMENT

RK Nathan J:

Facts

The 1st plaintiff is a businesswoman involved in the tourism and hotel industry and is the main shareholder and executive director of several companies connected with tourism and hotel services, including SMAS Travels Sdn Bhd, SMAS Rent A Car Sdn Bhd, Traveltrade Sdn Bhd, Residence Hotels Management Sdn Bhd, which runs several hotels including the Hotel Armada

Petaling Jaya and Residence Resort Paka in Trengganu. She is also a director and shareholder in a company whose shares are listed in the first board of the Kuala Lumpur Stock Exchange, that is, Lien Hoe Corporation Berhad, and is also well known to the public, particularly to those in the tourism and hotel industry as "Nonni Mahmood". The 2nd plaintiff is also a businesswoman involved in the tourism and hotel services industry. She is also the main shareholder and director of several companies dealing with tourism and hotel services, including Residence Hotels Management Sdn Bhd, which runs several hotels, including the Hotel Armada in Petaling Jaya and Residence Resort Paka in Trengganu and she was also a member of the board of directors of the Malaysian Tourism Promotion Board which is under the aegis of the Ministry of Culture, Arts and Tourism, and she is also well known to the public, particularly to those in the tourism and hotel industry, as "Rohana Ramli". Since both the fathers of both the plaintiffs were close friends, the 2nd plaintiff used to virtually live with the 1st plaintiff and her father virtually adopted the 2nd plaintiff as his 12th child. It was inevitable therefore that both the plaintiffs would team up to run a hotel management company called Residence Hotels Management Sdn Bhd (management company) since the 2nd plaintiff personally had the knowhow in hotel management having earlier worked as the director of marketing for the Hilton Hotel and then moving on to the Pan Pacific Hotels & Resorts. It is not in dispute that both the plaintiffs have had at least 20 years of experience in the hotel industry. The plaintiffs' management company now manages and operates the Hotel Armada in Petaling Jaya, the Residence Resort Paka in Paka, Trengganu, the Crescent Bay Resort in Yue Yang City, China, and the Residence Hotel at Universiti Tenaga Nasional at Bangi, Selangor.

Before I consider the articles in question, it is necessary to narrate certain other relevant background facts. The plaintiffs jointly set up a company called Seamos Marketing Sdn Bhd (Seamos) with two other British citizens who owned a British company called Byrom Consultants Ltd (Byrom). The commonwealth games was set to take place in Kuala Lumpur. Visitors, tourists and participants of the games needed accommodation. For this purpose Sukom Ninety Eight Bhd (Sukom) was set up to manage the commonwealth games. Sukom then set up a body called Sukom Accommodation Bureau (Bureau) to be in charge of providing accommodation during the commonwealth games on behalf of Sukom. Byrom was also involved in the tourism and hotel services and had had extensive experience during the previous World Cup and other international tournaments and in organising hotel accommodation and the related services. The project coordinator for Byrom was one John Raymond Eades. Sometime in May 1996 Byrom was invited by Sukom to present, at the Hotel Istana, a package by which Byrom proposed to manage, coordinate and control the hotel accommodation and reservation system for the

commonwealth games, for Sukom. The plaintiffs together with over 70 other hotel representatives were invited for this presentation. The plaintiffs teamed up with Byrom and formed Seamos to make a bid with Sukom. The plaintiffs were impressed with Byrom's Room Reservation System form of check-in, which they found "unusual, effective and efficient". They wanted to also at the same time learn from Byrom this technique which would benefit their local hotel and tourism industry and enhance their hotel management services. It was agreed that the plaintiffs would assist Seamos with their local expertise, knowledge and contacts whilst Byrom would teach them the new check-in technique. However, this arrangement fell through because the plaintiffs realised that Byrom was managing Seamos "without our greater consultative participation, contrary to our expectation". Agreeing to part as friends the plaintiffs transferred all their shares in Seamos to Byrom's nominees and resigned as directors of Seamos on 21 July 1997 as shown in form 49 of the Companies Act 1965 and lodged with the companies registry.

The plaintiffs thus sued for libel the 1st and 2nd defendants as authors of two articles published on 8 and 10 February 1998 in *"The New Straits Times"* (the Times) and the claim against the 3rd, 4th and 5th defendants is based on the fact that they were at all material times the sports editor, group editor and publisher respectively of the Times.

The Publication

Publication dated 8 February 1998 by the 1st defendant

This publication with the title "another bungle by 'our' officials" is reproduced herewith:

> WHAT fools Malaysian sport makes of us at times. You feel cheated and annoyed when the mandarins of sport give a wishy-washy defence each time they bungle.
>
> Sukom Accommodation Bureau (SAB) project coordinator John Eades joins the list this week.
>
> Eades, who works for Byrom Consultants Ltd, who are overseeing room inventory for Sukom Ninety Eight Bhd for the Commonwealth Games, in trying to justify the exorbitant hotel rates, insulted the intelligence of Malaysians.
>
> Eades had some arguments in defence and one of which was that at the time the rate was fixed a US dollar was worth RM2.50.
>
> "... but the exchange rate has gone up to more than RM4 and obviously everything you buy whether it's furniture or hotel rooms will certainly go up", argued Eades.

a I beg to differ.

Currency depreciation has nothing to do with the rates. Hotel accommodation is a 'local product', so to speak. In fact, in times of a slowdown, hotels usually are generous with their discounts.

b Eades was also wrong in saying that the rates charged in Kuala Lumpur were cheap compared to London or France who are hosting the soccer World Cup in June.

Here it is not comparing apples with apples. Obviously, the rates should be cheaper here than most of Europe, whether it is during the World Cup or not.

c Eades' third argument that "we (Malaysia) should not underprice ourselves ..." is hard to accept.

Eades should be reminded that we should also not price ourselves out if we wish to make Malaysia attractive to tourists.

d Always remember, they (consumers) have a choice.

SAB must remember the Commonwealth Games are not the only international sporting event scheduled for the year. The world will witness the soccer World Cup, the Asian Games in Bangkok in December and this week's Winter Olympics in Nagano.

e

Of course there are the other major events such as the World Cup athletics in Durban, South Africa on Sept 11-13, the hockey World Cup in Utrecht, Holland in May and other annual major events such as the Rugby 7s in Hong Kong.

In short, there are enough events for discerning fans to choose from.

f SAB should remember there is nothing worse than having the media highlighting the exorbitant prices in Kuala Lumpur. It is a sure way of killing KL as a tourist destination.

Now that SAB have announced that all hotels, bar one, will quote their rates in ringgit, it must be made clear that even then the rates should be competitive.

g

They should be the normal published rates, with some sort of discount. For example, SAB cannot allow the hotels to quote in ringgit, based on the present exchange rate. So a room which previously cost US$100 (RM250) cannot now be priced as RM380.

h Actually, the brouhaha surrounding the hotel rates could have been avoided if Sukom had consulted the Olympic Council of Malaysia (OCM), the prime movers in getting the Games.

In their bid document, Malaysia had promised that there will be no excessive hikes in hotel rates and gave their word to the Commonwealth Games
i Federation (CGF).

"One of the factors that favoured us against Adelaide when we made the bid in 1992 was that our rates were far cheaper," said OCM general secretary Sieh Kok Chi.

Sieh, who has attended numerous international Games, said SAB's initial rates were "too high".

Sieh draws comparison with the 1996 Atlanta Olympics. OCM paid US$185 nett a room (for two) at the Games' flagship hotel.

For delegates who attended the CGF assembly in Atlanta, OCM paid US$120 a room.

In Malaysia, the Palace of Golden Horses, the Games' flagship hotel, is charging US$200 a room.

Sukom should remember that most of the Commonwealth countries are not rich. In fact, the Falkland Islands have written to OCM asking for cheaper accommodation as they cannot afford the US$200.

Similarly, Mauritius sounded OCM for alternative accommodation.

Sukom should also ensure the rates for the media are affordable as most countries cannot afford these rates. The media is vital for the success of any Games as bad Press will not do the country's image any good.

Sukom should have shed some light on SAB.

SAB is a business arrangement between Sukom, London-based Byrom Consultants Ltd and Seamons Marketing, a company belonging to two Malaysian businesswomen, Noni Mahmood and Rohana Ramli.

It is based on profit sharing with Byrom and Seamons keeping 70 per cent and Sukom 30 per cent.

Sukom are expecting a minimum of RM2 million.

Sukom marketing director Rosli Selamat said the hotels are giving SAB a discount ranging between five and 35 per cent off the published rates. With a mark up of between five and 28 per cent, SAB are expected to make a cool RM10 million.

Rosli said Byrom, with their vast experience in handling the World Cup soccer tournament in Mexico as well as the USA '94 World Cup, will be in a position to "manage room inventory to generate income for Sukom."

"At any Games, accommodation is a source of income for the organisers. So we thought it was not a bad idea to have this arrangement," said Rosli.

But Rosli denied Byrom have a monopoly on hotel rooms during the Games. Travel agents and individuals can opt to deal straight with hotels. According to him, some Australians have booked their rooms directly.

"We shortlisted 90 hotels including those in Langkawi. Seventy one signed with SAB.

"Twenty six of the 71 quoted their rates in ringgit, the rest in dollars. But now all of them are quoting in ringgit based on a RM2.52 to a dollar."

And the Byrom offer does not provide the customary breakfast."

Publication Dated 10 February 1998 By The 2nd Defendant

This publication with the title "Let's not starve to death the very essence of the games" is reproduced where it is relevant:

"SPORTS is being given the short end of the stick again – the economic crunch a handy crutch to hobble on.

The preparation of athletes for the Commonwealth Games has been compromised. The Malaysia Games, Sukma, is a casualty – downsized from outsized through economic reality. The very athletes whom these Games are supposed to serve are being sacrificed.

Sure, it's all right to be frugal, thrifty and moderate. But why the obscenely extravagant budgets in the first place? Why should sports be made to pay a heavy price for the profligacy of the system?

The catch phrases, and we are ever so good at coining slogans, which sports officials have latched on to are "cutting costs", "tightening the belt", "austerity drive" and such. If only they meant it.

But why should the national athletes and budding talent have to suffer the brunt of this sudden concern for cost effectiveness after the extravagance of past indiscretions?

...

Was there any need to put a whopping RM20 million budget for the Malaysia Games in the first place? Or those hundreds of millions for the Commonwealth Games? They were overbudgeted from the start.

When I raised these questions early last year, before the seams of the economy gave way, Sukom were indignant and outraged. I was assailed with invective and abuse.

But how do they explain the huge sums being drained through the payment of huge sums for rentals of halls, and to middlemen and sub-contractors.

How do they explain the fact that a middleman, in this case apparently middlewomen, is going to profit handsomely through the Sukom Accommodation Bureau (SAB) who are embroiled in a controversy over exorbitant hotel rates?

SAB are a business arrangement between Sukom, the London-based Byrom Consultants Ltd and Seamons Marketing, a company belonging to two Malaysian businesswomen – Noni Mahmood and Rohana Ramli.

It is based on profit-sharing with Byrom and Seamons keeping a hefty 70 per cent and Sukom only 30 per cent.

What sort of deal is this? Why was it necessary for Seamons to be involved at all? Shouldn't, or couldn't, Sukom have entered into a direct deal with Byrom and split the profits 50-50?

What was the need for Seamons? Who are Noni Mahmood and Rohana Ramli? Questions and more questions? In the interest of transparency and accountability, of course.

How many more such deals are draining the millions tied up with Sukom?

Sukom were set up to organise the Games and turn a profit, if they could, for sports. Not to enrich individuals. The profits would have been returned to sports but at the rate they are going there is not going to be any and losses will be conveniently blamed on the economic slowdown. The signs are already there.

The Malaysia Games never needed such a massive RM20 million budget in the first place. Indonesia hosted the last Sea Games for less.

But it is all about style and one-upmanship and the opportunity to make a ringgit or two on the side, isn't it?

So now they make a grand show of whittling it down to RM5 million and have done away with some sports depriving hundreds of young athletes the chance to test their mettle.

...

Let's control expenditure by all means, but let's not starve to death the very essence of the Games.

For ultimately, it's sports that matters, not the Sports Ministry, NSC, Sukom or the Selangor State Government.

The Plaintiffs' Claim

The 1st plaintiff prayed for:

(1) General damages amounting to RM2.5 million.

(2) Aggravated and/or exemplary damages amounting to RM2.5 million.

(3) Interest on all sums awarded at the rate of 8% per annum from date of filing of the writ till full settlement.

(4) An order prohibiting the defendants or their employees, directors, agents from writing, printing, publishing and/or circulating the contents of both articles or by any other means, from defaming her.

The 2nd plaintiff prayed for the same prayers (1) to (3) of the 1st plaintiff's claim. There was also a prayer for costs by both parties.

Finding Of The Court

Factual Error Relating To The Publication

The plaintiffs had resigned from Seamos as of 21 July 1997. The two impugned articles were published on 8 February 1998 and on 10 February 1998 respectively. Clearly both the plaintiffs were no longer either shareholders or directors or in any way involved with Seamos at the time the articles were published. It is therefore important to note that whilst the defendants, as admitted by them, could have easily ascertained whether the plaintiffs were indeed at the material time of the publication, directors and/or shareholders of Seamos by making a search at the registrar of companies, the defendants had failed to do so. The 1st defendant under cross-examination admitted he did not make a search which he could have done and the 2nd defendant a very senior and experienced journalist, admitted that he merely relied on the experience of the 1st defendant. He believed that since the 1st defendant had made the first publication, he would have done the necessary ground work and would have ascertained the fact that the plaintiffs were still involved in Seamos. In any case in a defence of fair comment the onus is on the defendants to prove any allegations of facts to be true, and this the defendants have failed to do.

Are The Articles Defamatory Of The Plaintiffs?

I accept the evidence of both the plaintiffs that the articles were defamatory of them and were calculated to disparage them in their respective office. I hold that the reference to "Nonni Mahmood" and "Rohana Ramli" in the articles referred to the 1st plaintiff and 2nd plaintiff respectively. The 1st defendant in his article says:

> SAB is a business arrangement between Sukom, London-based Byrom Consultants Ltd and Seamons Marketing, a company belonging to two Malaysian businesswomen, Noni Mahmood and Rohana Ramli.

As I said earlier this is indeed a factual error. The allegation in the article that Byrom and Seamos were keeping 70% with Sukom only retaining 30% of huge profits based on exorbitant room rates was incorrect.

The 2nd defendant in his article says:

> How do they explain the fact that a middleman, in this case apparently middlewomen, is going to profit handsomely through the Sukom Accommodation Bureau (SAB) who are embroiled in a controversy over exorbitant hotel rates?

There was clear reference to the two plaintiffs owning Seamos. The rhetorical questions of the 2nd defendant,

> What was the need for Seamons? Who are Noni Mahmood and Rohana Ramli? Questions and more questions? In the interest of transparency and accountability, of course.

and the further question,

> How many more such deals are draining the millions tied up with Sukom?

clearly refer to the plaintiffs. I am satisfied that the articles when read as a whole would lead those who were dealing with the plaintiffs to the conclusion that the said articles referred to them and that both the said articles were defamatory of the plaintiffs, and were written with the intention of identifying them. The test is an objective test. The inference that is clearly drawn from the first article is that the Bureau, having obtained discounts from the participating hotels in respect of their published rates, would be raising the hotel rates it would be offering, and would thus be able to reap a profit of RM10 million and that the 1st and 2nd plaintiffs as shareholders in Seamos would equally make millions. The result would be that the tourists would conclude that the hotel rates were far too high and this would prevent tourists from visiting Malaysia and in particular Kuala Lumpur.

To my mind, the contents of the second article clearly pointed out that the plaintiffs would make large profits from the involvement of Seamos in the Bureau. There is also the inference that the plaintiffs care only for their own self-interest motivated with the desire to reap large profits obtained discreetly and without transparency or accountability. The further inference is that due to the profits that Sukom and the plaintiffs would reap, the unfortunate athletes, who ought to be the full recipients of any profit that Sukom would have made had it gone on a 50-50 venture directly with Byrom, and without involving Seamos, are now deprived of the opportunity of benefiting from such profits, thus resulting in the cutting down of the events and items during the commonwealth games due to inadequate training, due to inadequate funds.

I also accept the fact that the Times is one of the foremost newspapers of this country and an almost household word with the Malaysian population having a wide and extensive circulation. I also accept the plaintiffs' evidence

that they are respectively known as "Nonni Mahmood" and "Rohana Ramli" by everyone including those in the hotel industry.

As I said in *Ratus Mesra Sdn Bhd v. Shaik Osman Majid* [1999] 3 MLJ 529 at 535:

> ... the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (see *Gatley on Libel and Slander* (9th Ed) para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. In fact at para 2.38 Gatley says that 'In the case of a newspaper article or television or radio broadcast, the defendant is entitled to have read as part of the plaintiff's case, the whole of the piece from which the alleged libel is extracted'.

Whether the words complained of are defamatory or not is a question of fact depending on the circumstances of each case. The articles clearly suggested that the plaintiffs cared only to make a quick buck and had no regard to the fact that such conduct would have an adverse effect upon tourists visiting this country and especially during the commonwealth games and the plaintiffs being involved in the hotel industry would no doubt be adversely affected by such publications.

It was argued by the defendants that the plaintiffs had not identified the specific words or sentences that are defamatory of them. To my mind the law of defamation would remain impotent if the courts were to put such a narrow and simplistic interpretation. Not only words and sentences can be defamatory, it is also possible, after reading the entire article, to hold that the said article read as a whole is defamatory of the plaintiff because of the chain of events entwined throughout the article, to form a tapestry, that portrayed the plaintiffs as the ones defamed.

Defence Of Fair Comment

To succeed in this defence the defendants must establish four elements:

(i) The words complained of are comment, although they may consist or include inferences of fact;

(ii) The comment is on a matter of public interest;

(iii) The comment is based on facts; and

(iv) The comment is one which a fair-minded person can honestly make on the facts proved.

I shall apply these four tests to the case before me.

The averment as a fact that the two plaintiffs owned Seamos was a fatal crack in this defence. Further, the statement as a fact that the room rates were indeed exorbitant was again proven wrong through the evidence that was led. In respect of the second article the question:

> But how do they explain the huge sums being drained through the payment of huge sums for rentals of halls, and to middlemen and sub-contractors.

suggests that it is a fact that such huge sums have indeed been drained when no evidence was led that this was so. There was, also the suggestion that the "middlewomen", namely, the two plaintiffs herein were "going to profit handsomely". As I had stated earlier to realise the full import of the defamatory statement, the two articles have to be considered as a whole due to the link up of the various aspects and parties to these publications. Where the defendants rely on the defence of fair comment, it is necessary for the defendants to indicate what are the facts and what are the comments. But in this case, the 1st defendant admitted quite candidly that he failed to make a search at the registry of companies from where he could have easily ascertained that the two plaintiffs were never involved in Seamos nor were parties to the "deal" he was accusing them of. The 2nd defendant also very candidly admitted that since the 1st defendant was a senior and experienced writer he had concluded that the facts as stated by the 1st defendant must have been verified and ascertained as correct, because the 2nd defendant based his second article relying totally on the 1st defendant's first article. It is clearly the duty of the defendants to write in such a way that the reader is able to distinguish between what is a fact and what is a comment. Where facts and comments are so intermingled as in this case, the reasonable reader would assume that the injurious statements are clearly based on adequate factual grounds known to the writers. It is no doubt trite law that any statement which does not indicate with reasonable clarity that it is a mere comment and not a statement of fact, cannot in my view be protected by the defence of fair comment. In fact, it is appropriate to cite Fletcher Moulton LJ in *Hunt v. Star Newspaper Co Ltd* [1908] 2 KB 319, wherein his Lordship said in regard to the defence of fair comment:

> If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.

However, it is also appropriate to remember that by virtue of s. 9 of the Defamation Act 1957, the defence of fair comment "shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or

referred to in the words complained of". It is my judgment however that s. 9 does not come to the aid of the defendants in this case. There is a fatal fundamental flaw in the defendants' assertion as a fact that the two plaintiffs were owners of Seamos at the material time of the publication when such was not a fact at all. Whilst it is undeniable that the articles revolved upon matters of public interest especially relating to boosting tourism in Malaysia, which needless to say would be enticed by reasonable hotel rates, yet freedom of speech coupled with a licence to write must be subject to the law of libel and slander for without these constraints persons and parties who have been unjustifiably maligned will have no recourse.

Malice

It is set law that where a defendant is indifferent to the truth or otherwise of the words complained of, express or actual malice may be inferred (see *Ratus Mesra, supra*). It is clear that the 1st defendant had acted recklessly in failing to carry out any proper enquires of the plaintiffs' status in Seamos before concluding that they owned Seamos. He relied on his discussion with one Mohammad Rosly bin Md. Selamat, PW4, who at the material time was the Director of Marketing of Sukom, for the background information relating to Sukom, Byrom and Seamos. However, PW4 emphatically maintained in his evidence that the 1st defendant did not ask of him if the plaintiffs were still with Seamos. However, he insisted that he informed the 1st defendant to check the details. I have no reason to doubt PW4. However, in any case the 1st defendant, who has been consistently allowed by the 5th defendant to write a feature column in "*The New Straits Times*" entitled "Point by Randhir Singh" in respect of matters relating to sports, and who then must of necessity possess the necessary skill, ability and flair, could have easily checked, as he admitted he did not, with the registrar of companies (ROC), to ascertain if the plaintiffs were shareholders and directors of Seamos at the time of his publication. The 1st defendant readily agreed under cross-examination that if his search at the ROC had disclosed that the two plaintiffs were no longer with Seamos he would not have mentioned their names. What is most surprising is the 1st defendant's admission that it never crossed his mind that if his facts were not right the plaintiffs would suffer tremendous damage. This admission is clearly indicative of a callous hand moved by a reckless mind, oblivious of ill consequences affecting the subjects of his penmanship. On his own admission he gave scant thought to the possible suffering the plaintiffs would undergo if his facts were untrue. The 2nd defendant frankly admitted relying on the experience of the 1st defendant to check out and ascertain the facts. Herein lay his fault. It is necessary therefore that responsible newspapers insist that proper checks be made of basic facts which facts can easily be ascertained

before publishing the articles. It is trite law that a writer may not suggest or invent facts and then comment upon them on the assumption that they are true (see *Joshua Benjamin Jeyaratnam v. Goh Chok Tong* [1989] 3 MLJ 1 PC).

Qualified Privilege

This defence has been abandoned.

Defendants' Intention Immaterial

I must also bear in mind that whilst the defendants' intention could have been honourable it being their public duty as a reasonable and well accepted newspaper to comment on current issues that could affect or boost the country's economy, it is also pertinent for this court to remember that libel does not depend on the intention of the defamer and that it is irrelevant to consider the meaning the writers and publisher intended to convey. The question is to be determined by a reasonable reader. In fact the 1st defendant testified that he was referring to the issue relating to excessive mark-up of hotel rates during the commonwealth games and not to individuals. He was motivated to do so because of the numerous complaints concerning the games. Whilst that might be the intention of the 1st defendant, by linking the plaintiffs to the company that was behind the excessive mark-up of the hotel rates, when the plaintiffs had nothing to do with the said company, the 1st defendant had clearly embroiled the plaintiffs with the issue. The defendants urged this court to rely on the case of *Charleston & Anor v. News Group Newspapers Ltd* [1995] 2 WLR 450 and not give any weight to the headlines of the articles. I must hasten to add that the same authority reflected the view that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader **to the entire publication** (emphasis provided). In respect of the 2nd defendant I reject his explanation that his article referred to "the essence of the games, instead of the excesses of the games". He was careless in relying on the 1st defendant to launch an attack on Seamos and to link the plaintiffs to Seamos when the plaintiffs had left Seamos much earlier.

Damages

The words written by the 1st and 2nd defendants were capable of a defamatory meaning and were indeed defamatory of the plaintiffs considering the fact that the so-called facts were proven to be untrue. The articles imputed to the plaintiffs' dishonourable and unscrupulous conduct and lack of integrity and such an imputation upon the character of the plaintiffs certainly warrants

reasonable damages. It is a fact that the libellous publications appeared in a reputable and leading newspaper in the country which has a wide circulation and since the Times is also carried by the airlines in their aircraft, they also have possible overseas circulation. Both the plaintiffs are obviously involved in the hotel industry for more than 25 years. The 1st plaintiff is a leading businesswoman and is also a director and shareholder of a public listed company and a director of several other companies dealing with tourism. She led evidence as to her siblings' impressive achievements. Clearly she is a well recognised personality in the world of business. The 2nd plaintiff had risen to the present position through dint of hard work. She led unchallenged evidence that she was appointed to the Malaysian Tourism Board by the Minister of Culture, Arts and Tourism because of her long and continuous relationship with the hotel industry. She is also a shareholder and director of a number of companies dealing with tourism and hotel services. Both plaintiffs led evidence as to their substantial income and present means.

Libel is actionable per se without proof of actual harm.

General Damages

Having found that the plaintiffs hold themselves high in the business world and considering the fact that the Times has a wide circulation in the country there is no doubt in my mind that the plaintiffs have by these publications been brought to ridicule and contempt. The plaintiffs had testified that they have been gravely injured in their reputation. In fact the 2nd plaintiff had even been dropped from the Malaysian Tourism Board. The 1st plaintiff being the main shareholder of a public listed company cannot afford such taint upon her reputation. Having considered all factors I award the 1st plaintiff general damages in the sum of RM300,000 and the 2nd plaintiff the sum of RM200,000.

Aggravated Damages

In considering an award under this category the court will take into account the conduct of the defendants from the time they received notification challenging their publications and up to the date of the conclusion of the trial. Whilst both the 1st and 2nd defendants have clearly admitted during the trial, that had they known that the plaintiffs were not involved in Seamos they would not have involved them, I am at a loss to understand why the defendants could not have, as soon as they received a demand notice from the plaintiffs, immediately caused a check to be made with the registry of companies as to whether the plaintiffs were involved in Seamos at the time of both the publications. Their search would have shown the plaintiffs' non-involvement. Surely common sense dictates that immediately an apology could have been

tendered in their same newspaper to mitigate the damages. Even assuming this did not occur to the defendants, I just cannot understand why the defendants went on defending this action without even tendering an apology in court. This nonchalant and indifferent attitude has prolonged the agony of the plaintiffs causing unnecessary mental distress, hurt and anxiety. In fact the 2nd plaintiff became emotional in court. In the light of the fact that even as I write this judgment no offer of apology has been tendered and considering the reckless manner in which the articles were written, clothing a non-existent fact with the mantle of truth, the award under this head must reflect the uncaring attitude of the defendants. With no basis for holding such a factual matrix the defendants were indeed foolhardy in persisting with the defence of fair comment. I therefore award each of the two plaintiffs a sum of RM200,000 as aggravated damages. There is no room in this case for exemplary damages which has not been seriously pursued in any event. In respect of the 1st plaintiff she will also have the additional prayers asked for prohibiting the defendants or their employees, directors, agents from writing, printing, publishing and/or circulating the contents of both articles or by any other means, from defaming her.

There will be interest on all awards at 4% from 10.2.98 to date of judgment and costs.